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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 WILLIAM MATTHIS, JR.,

12 Plaintiff,

13 vs.

14 ASBESTOS DEFENDANTS (B ♦ P),

15 Defendants.
16

No. 3:07-cv-02866-SC

17 **RE-NOTICE OF MOTION AND**
MOTION TO REMAND CASE TO
CALIFORNIA SUPERIOR COURT
AND FOR PAYMENT OF FEES AND
COSTS; MEMORANDUM OF POINTS
AND AUTHORITIES

18 **Date:** August 17, 2007
(Reset from August 10, 2007)

Time: 10:00 a.m.
19
20

21 TO ALL DEFENDANTS IN THIS ACTION AND THEIR ATTORNEYS OF RECORD:

22 Notice is hereby given that on Friday, August 17, 2007 at 10:00 a.m., or as soon
23 thereafter as this matter may be heard, in Courtroom 1 of the above-entitled court, located at
24 450 Golden Gate Avenue, San Francisco, California, plaintiff will move the court for an Order
25 remanding this case to the Superior Court of California in and for the City and County of San
26 Francisco, and awarding costs and fees incurred in the making of this motion. This motion is
27 based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of
28

1 Lloyd F. LeRoy, the allegations in plaintiff's complaint, the defendant's Notice of Removal, and
2 such argument as may be made at the hearing.

3
4 Plaintiff seeks remand on the ground that defendant has neither alleged nor provided
5 evidence to support a legitimate basis for removal under 28 U.S.C. § 1442(a). Under 28 U.S.C.
6 §1447(c), plaintiff requests payment of the costs and fees incurred in the making of this motion,
7 because the lack of a basis for removal was apparent on the face of the Notice of Removal.

8
9 Dated: June 29, 2007

BRAYTON ♦ PURCELL LLP

10 /s/ Lloyd F. LeRoy

11 By: _____
12 Lloyd F. LeRoy
13 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 INTRODUCTION AND STATEMENT OF ISSUES

4
5 This is an action for personal injuries arising out of plaintiff William Matthis' exposure
6 to asbestos.

7 In his capacity as an insulator, plaintiff performed work at many job sites. Among
8 those was a facility in San Diego named Southwest Marine, Inc.. He recalls working there on
9 one U.S Navy vessel, whose name he cannot recall, during the period 1979 - 1985. He recalls
10 installing pipe insulation and working around other individuals who were working on boilers,
11 pipes, valves and insulation. Some of those individuals were employees of Southwest Marine.
12 The removing defendant, BAE Systems San Diego Ship Repair Inc., is the successor to
13 Southwest Marine Inc. Both entities will be referred to hereafter as "BAE."
14

15 BAE removed this case on one stated ground: 28 U.S.C. §1442(a)(1), commonly known
16 as the federal officer removal statute, which permits removal by "any officer of the United
17 States or any agency thereof, or person acting under him for any act under color of such office."
18 This motion raises one issue: whether BAE has even alleged facts sufficient to support removal
19 under that statute.
20

21 Under settled law, a basis for removal exists only if BAE was given specific instructions
22 by an officer of the United States Government to use asbestos-containing products in the ship
23 plaintiff worked on, and if that federal officer prohibited BAE from warning plaintiff that
24 asbestos was in use and of the dangers of that use. BAE's removal petition carefully stops short
25 of making that claim. Instead, it makes generalized, conclusory allegations that "[s]ince BAE
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1 performed work on a military vessel on which plaintiff worked, and such work was responsible
2 for his injuries, said work was performed pursuant to contracts and specifications executed by
3 an officer of the United States;" that "[o]n the Navy vessels, BAE's work was performed
4 pursuant to mandatory comprehensive and detailed specifications, plans and/or other drawings
5 that were created approved, and accepted by the United States Military and/or the United States
6 Navy," and that "BAE has asserted a federal defense to this action: immunity from liability for
7 injuries arising from any exposure to asbestos on the vessel, worked on by BAE and upon
8 which plaintiff worked." Notice of Removal, ¶¶ 6, 7, 9. Significantly, BAE's removal contained
9 no evidence to support these conclusory statements. In light of the standards set out by this
10 Court in addressing previous removals of the same nature, these conclusory allegations are not
11 sufficient to invoke the federal officer removal statute.
12
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15 Thus, on it's face, BAE's removal notice does not state a legitimate basis for removal.

16 II.

17 STATEMENT OF FACTS

18 This action was filed by Mr. Matthis in the San Francisco Superior Court on April 2,
19 2007, and was assigned case number 07-274138.¹ Exhibit A to Defendant's Notice of
20 Removal.
21

22 During a 6 year period from 1979 - 1985, while employed as an insulator, Mr. Matthis
23 worked at various jobsites. One of those sites was the BAE facility in San Diego where he
24 performed work aboard a Navy ship. He recalled insulating pipes and a boiler in the boiler
25
26

27 ¹Pursuant to San Francisco Superior Court General Order 55, the plaintiff's complaint was filed in
28 summary form and incorporated by reference a Master Complaint for asbestos personal injury cases filed
previously by the law firm of Brayton Purcell.

1 room. He reworked alongside boiler makers repairing boilers, shipfitters working with
2 sheetmetal, electricians cutting and routing electrical wires, welders welding, insulators, and
3 pipefitters replacing sections of pipes. He further recalled that some of the trades were BAE
4 employees. He contends that this activity exposed him to asbestos which has caused his
5 asbestos-related disease. (Plaintiff's answers to Standard Asbestos Case Interrogatories, Exhibit
6 B to BAE's Notice of Removal)
7

8 On May 4, 2007, the Complaint and associated documents were served on BAE's agent
9 for service of process. Notice of Removal, Exhibit A. BAE filed its Notice of Removal on
10 June 1, 2007.
11

12 III.

13 ARGUMENT
14

15 In addressing a motion for remand a court must always keep in mind that, because
16 removal of an action to state court implicates federalism concerns and deprives the plaintiff of
17 his chosen forum, the removal statutes must be strictly construed against jurisdiction. *Hofler v.*
18 *Aetna US Healthcare*, 296 F.3d 764, 767 (9th Cir. 2002). If there is any doubt about the
19 propriety of removal, the case should be remanded to state court. *Matheson v. Progressive*
20 *Specialty Insurance Company*, 319 F.3d 1089, 1090 (9th Cir. 2003). There is a "strong
21 presumption against removal jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.
22 1992). The defendant that removed the case from state court bears the burden of proving that
23 removal was proper. *United Computer Systems v. AT & T Corp.*, 298 F.3d 756, 763 (9th Cir.
24 2002). Applying these principles to the specific issues raised by this case leads to a clear
25 determination that this case should be remanded to state court.
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1. BAE SYSTEMS HAS NOT ALLEGED A BASIS FOR REMOVAL
UNDER THE FEDERAL OFFICER REMOVAL STATUTE

BAE's Notice of Removal is insufficient on its face.

"Removal based on the existence of a federal question ... must allege all facts essential to the existence of that federal question." *Thomas v. Burlington Industries, Inc.*, 763 F.Supp. 1570, 1576 (S.D. Fla. 1991) (citing *Wright v. Sterling Investors Life Ins. Co.*, 747 F.Supp. 653, 655 (N.D.Ala.1990)). Compare *London v. Standard Oil Co.*, 417 F.2d 820, 822 (9th Cir. 1969) (notice of removal based on diversity was fatally defective where the corporate defendant included its state of incorporation but failed to allege the state in which its principal place of business was located, although defect could be cured with immediate amendment); *Wenger v. Western Reserve Life Assurance Company*, 570 F.Supp. 8, 10 (M.D. Tenn. 1983) (A removing defendant cannot simply state that the case falls within the court's diversity jurisdiction, but must allege "specific facts ... so that this Court itself will be able to decide whether such jurisdiction exists.") .

A notice of removal that contains no more than a "bare-bones contention" that the case is removable on the basis of a federal statute is insufficient and subject to remand. *Thomas, supra*. Here, bare-bones contentions is all that BAE provides.

A defendant that seeks to remove a case under Section 1442(a)(1) has the burden of proving four jurisdictional elements: (1) that it is a "person" within the meaning of the statute; (2) that it acted under the direction of a federal officer; (3) that there is a causal nexus between the plaintiff's claims and the acts the defendant performed under color of federal office; and (4) that it has a colorable federal defense to the plaintiff's claims. *Arnold v. Blue Cross & Blue Shield*, 973 F.Supp. 726, 739 (S.D. Texas 1997) (citing *Mesa v. California*, 489 U.S. 121,

124-25, 129-31, 134-35 (1989)).

While arguably BAE does not allege facts to support any of the above-stated elements of federal officer removal, plaintiff will address only the second, third and fourth.²

1. BAE's Allegations Do Not Establish that It
Acted Under the Direction of a Federal Officer

BAE has not established that in managing, or performing the work on the Navy vessel it was "acting under" authority of any United States official. This element requires a relationship akin to that between a master and a servant. BAE must show that it worked under the "direct and detailed control" of a federal official. *Arnold*, 973 F.Supp. at 740. The defendant must show that it was under the control of a specific, individual federal official, and cannot rely on generalized allegations that it was supervised by an entire agency. *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996); *Pack v. ACandS, Inc.*, 838 F.Supp. 1099, 1103 (D.Md. 1993); *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 939 (E.D.N.Y. 1992).

The holding in *Good v. Armstrong World Industries* is quite instructive. As in this case, the plaintiff alleged exposure to asbestos during his service in the U.S. Navy. The removing defendant in that case, Westinghouse, was named in the case because it manufactured turbine generators which plaintiff worked on as a seaman, and which allegedly contained and emitted asbestos dust. Westinghouse offered proof that it manufactured the turbines under government contracts and was bound to meet the general performance specifications set by the Navy. Its

²As to the first element, some courts have held that a corporation has no right to exploit the protection of the Federal Officer Removal Statute. *Krangel v. Crown*, 791 F. Supp. 1436, 1442-1446 (S.D. Cal. 1992); *Arnold*, 973 F.Supp. at 739. The statute directly descends from a Civil War era law intended to shield individual federal officers from "local prejudice and harassment in state courts for acts done in their official capacity." *Krangel, supra*. Congress never intended the statute to allow a large corporate defendant to forum hop from state to federal court in civil litigation. Nevertheless, the majority of courts now hold that corporate defendants may invoke this statute, so plaintiff does not press the issue here.

1 witness testified that the production of the turbines was pursuant to Navy design and
 2 construction drawings and written specifications, and that Navy officers and civilian employees
 3 worked at the Westinghouse plant and supervised production of the turbines. *Id.* at 1128.
 4 Nevertheless, the court determined that neither Westinghouse's notice of removal nor its
 5 affidavit established that any specific Navy official had the necessary control to establish the
 6 "acting under" element:
 7

8 Although it is true that the United States Navy and many individuals employed
 9 by the Navy worked with Westinghouse, Westinghouse does not show that the
 10 Secretary of the Navy or any other federal officer directly controlled and
 11 supervised the work of Westinghouse. *Cf. Noble v. Employers Ins.*, 555 F.2d
 12 1257 (5th Cir.1977) (finding the "acting under" requirement satisfied where the
 13 defendant-surgeon had acted under the immediate supervision of the
 14 Administrator of Veteran Affairs, who evaluated the defendant-surgeon's
 15 performance and determined his hours and working conditions).

14 *Id.* at 1129.

15 Here, BAE failed to allege any facts or provide any evidence to show that it acted under
 16 the direct control of any federal officer when it worked on the Navy vessel. BAE offered no
 17 contracts, no instructions, no designs and no drawings to indicate that any government officer
 18 oversaw the work. The result reached in *Good* is no less appropriate here.
 19

20
 21 2. BAE Has Neither Alleged Nor Proven a
 22 Causal Nexus Between Plaintiff's Asbestos Injuries and
Actions It Performed "Under Color of Federal Office."

23 The "causal nexus" element of federal officer removal raises the bar that a defendant
 24 must scale even higher. If the defendant "establishes only that the relevant acts occurred under
 25 the general auspices of federal direction then it is not entitled to § 1442(a)(1) removal." *Arness*
 26 *v. Boeing North American, Inc.*, 997 F.Supp. 1268, 1273 (C.D. Cal. 1998). *See also Good*,
 27 *supra*, 914 F. Supp. at 1128. To establish the causal nexus element, BAE must show that it
 28

1 included asbestos-containing products and failed to warn of the dangers at the specific
2 command of a federal officer. *Arnold*, 973 F.Supp. at 740 (removing defendant "must prove that
3 it acted under the direction of a federal officer while performing the actions that underlie
4 Plaintiff's complaint."). To sustain its burden of proof, "the defendant must also 'by direct
5 averment exclude the possibility that [the state action] was based on acts or conduct of his not
6 justified by his federal duty.'" *Freiberg, supra*, 245 F.Supp.2d at 1156 (quoting *Mesa*, 489 U.S.
7 at 132). Put simply, unless an officer of the United States Government consciously and
8 deliberately directed the use of asbestos and directed that no warnings be given (as opposed to
9 just rubber-stamping design specifications), there is no causal relationship between the
10 Government's control and the claims made in this action. Without that express direction from a
11 federal official, it must be presumed that BAE's use of asbestos and failure to warn were it's
12 own choice, not that of the Government.

13
14 Here then, to justify removal, BAE must show that it had no choice whether to use
15 asbestos and whether to warn of its dangers, because federal officials knowingly specified and
16 directed the use of asbestos and directed that no warnings be given. BAE must show that even
17 if it had wanted to omit asbestos from its work, it would have been unable to do so because of a
18 direct and detailed command from federal officials. It must show that even if it had wanted to
19 warn of the dangers of asbestos in its yard and aboard the ship it would have been unable to do
20 so because of a direct and detailed command from federal officials. BAE has not even alleged,
21 much less proven, that this was the case.

22
23 Several courts have previously addressed situations in which military government
24 contractors attempted to remove state court actions under the federal officer removal statute on
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1 the basis of vague allegations of government control, and their holdings are instructive. In
 2 *Pippins v. Asbestos Defendants*, No. C 00-1356 (N.D. Cal. 2000)(copy attached), Judge Alsup
 3 faced an action that had been removed by Rolls-Royce PLC, the successor to Allison Engine
 4 Company. The plaintiff, a jet engine mechanic for 36 years, alleged asbestos exposure from
 5 Allison engines. Rolls-Royce removed the case under the federal officer removal statute, but
 6 Judge Alsup remanded it, finding no causal connection between Allison's alleged "working
 7 under" military contract officers and the claims made in the lawsuit.
 8

10 In the volume of documents submitted by defendant and describing the oversight
 11 of the United States government during the design and manufacturing of the
 12 T56, the word 'asbestos' appears not once. Nor during oral argument could
 13 defendant name a single asbestos-containing part that the government directed it
 14 to incorporate into the engine. Defendant thus was free to use whatever
 15 standard parts it believed appropriate. No causal relationship has been shown
 16 between defendant's alleged choice of asbestos and the government's actual
 17 orders to defendant. Hence, plaintiff's motion to remand should be granted.

18 Slip op. at 4.

19 In *Groombridge v. Asbestos Defendants*, No. 00-01654 (N.D. Cal. 2000) (copy
 20 attached). Judge Chesney faced virtually the same set of facts presented by the same removing
 21 defendant, and she reached the same result as Judge Alsup. She held that the defendant failed
 22 to meet the "nexus" element because the "voluminous materials" it submitted "contain[ed] no
 23 requirement or even reference to the use of asbestos." Slip op. at 3. The judge cited a previous,
 24 similar holding by this Court, *Cabalic v. Owens Corning Fiberglas Corp.*, 1994 WL 564724
 25 (N.D. Cal. 1994), and distinguished other cases that denied motions for remand where "the
 26 government specified the use of asbestos." *Id.*

27 In *Good, supra*, after finding that Westinghouse had failed to establish the "acting
 28 under" element of federal officer removal, the court further held that because there was no proof

1 that the a government official required the use of asbestos in its turbines, Westinghouse had
2 also failed to establish any causal connection between the conduct that underlay the state law
3 claim and any alleged federal control of Westinghouse's actions:
4

5 Neither the notice nor the affidavit establishes that a federal officer required the
6 use of asbestos in the design and manufacture of the turbine generators. In fact,
7 neither of those documents relied on by Westinghouse even mention asbestos.
8 Although other courts cited by Westinghouse may have permitted removal based
9 upon general assertions that the government imposed specifications in the
10 contracts, without the mention of asbestos as a particular component, I note that
11 this lack of specificity further supports my conclusion that Westinghouse has not
12 met its burden to make a causal connection between the state claim and the
13 conduct undertaken pursuant to the direction given by an officer of the federal
14 government.

15 914 F. Supp. at 1130.

16 In *Bahrs*, the plaintiff's claims for groundwater contamination arose out of the improper
17 disposal of chemicals used in an aircraft factory. General Dynamics removed the case on the
18 assertion that it's predecessor manufactured the aircraft under government contracts and
19 specifications; the Court held that this was insufficient to justify removal:
20

21 While the government officials were undoubtedly most interested in the
22 production of war materials, the record before this Court does not demonstrate
23 the government's necessary control over the method of waste disposal. **The**
24 **mere fact that the government possessed the power to exercise control over**
25 **the project does not establish that the power was in fact ever exercised.**

26 *Bahrs, supra*, 795 F.Supp. at 970 (emphasis added).

27 Similarly here, while BAE states that the United States had the power to control its
28 work, it does not show that this power was in fact ever exercised to require or otherwise
regulate the use of asbestos.

Lest there be any confusion, while these standards might call to mind the requirements
for establishing a government contractor defense, the standard for removal is, in fact, much

1 higher. Several federal courts have found that while the defendant presented a “colorable”
 2 government contractor defense, they did not establish a legitimate basis for removal under the
 3 federal officer removal statute. *E.G. Arness v. Boeing North American, Inc.*, 997 F.Supp. 1268
 4 (C.D. Cal. 1998); *Bahrs, supra.*; *Good, supra*, 914 F. Supp. at 1129.

6 The defendant’s burden of proving the elements of federal officer removal “is
 7 substantive and is not satisfied by incantations of government contractor status alone.”
 8 *Freiberg, supra*, 245 F.Supp.2d at 1152. *See also Ryan, supra*, 781 F.Supp. at 945 (stating that
 9 “the set of defendants who can avail themselves of § 1442(a) is smaller than the set of
 10 defendants who can make a colorable claim to a federal defense.”)

12 3. BAE Has Not Raised a Colorable Federal Defense.

14 BAE submits that it has a colorable defense under *Boyle v. United Technologies Corp.*,
 15 487 U.S. 500 (1988), but its allegations do not even clear this bottom rung of its hurdle.

16 Under *Boyle*, liability for design defects in military equipment cannot be imposed under
 17 state law when (1) the United States approved “precise specifications,” (2) the equipment
 18 conformed to those specifications, and (3) the supplier warned the government about the
 19 dangers in use of the equipment that were known to the supplier but not to the government. 487
 20 U.S. at 512. The government contractor defense will not “trump” a state claim in the absence of
 21 evidence that the contractor complied with the “precise specification” imposed on it by a
 22 specific officer of the United States government. *Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d
 23 582, 586 (9th Cir. 1996).

26 The defense amounts to a claim that “the government made me do it.” *In Re: Hawaii*
 27 *Federal Asbestos Cases*, 960 F.2d 806, 810 (9th Cir. 1991) (citing *In Re: Joint E. & S. Dist. N.*
 28

1 *Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)). It applies in very narrow circumstances:

2 *Boyle* displaces state law only when the government, making a discretionary,
3 safety-related military procurement decision contrary to the requirements of state
4 law, incorporates this decision into a military contractor's contractual
5 obligations, thereby limiting the contractor's ability to accommodate safety in a
different fashion.

6 960 F.2d at 810 (internal quotations omitted). *Accord Dorse v. Eagle-Picher Indus., Inc.*, 898
7 F.2d 1487, 1489 (11th Cir. 1990).

8 Here, BAE does not allege facts showing any element of this defense is present. There
9 is no allegation that there were any "precise specifications" which contained any direction that it
10 use asbestos-containing products or that prohibited it from warning of the dangers of asbestos..
11 Without that proof, it is neither possible nor necessary to consider any of the remaining
12 elements of this defense.
13
14

15 4. BAE's Request to Submit Additional Evidence Must be Denied

16 A defendant may not amend a removal petition after the 30 day time limit has passed,
17 except to correct matters of form or technical defects. *Bahrs v. Hughes Aircraft Co.*, 795
18 F.Supp. 965, 968 (D. Az. 1992) (citing *Barrow Development Co. v. Fulton Ins. Co.*, 418 F.2d
19 316 (9th Cir.1969). In its Notice of Removal, BAE asks: "Should plaintiff file a Motion to
20 Remand this case, BAE respectfully requests an opportunity to respond more fully in writing,
21 including the submission of affidavits and authorities." Notice of Removal ¶ 10. This should
22 not be permitted. As noted above, "Removal based on the existence of a federal question ...
23 must allege all facts essential to the existence of that federal question." *Thomas v. Burlington*
24 *Industries, Inc.*, 763 F.Supp. 1570, 1576 (S.D. Fla. 1991) (citing *Wright v. Sterling Investors*
25 *Life Ins. Co.*, 747 F.Supp. 653, 655 (N.D.Ala.1990)) A removing defendant cannot simply state
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1 that the case falls within the court's diversity jurisdiction, but must allege "specific facts ... so
2 that this Court itself will be able to decide whether such jurisdiction exists." *Wenger v. Western*
3 *Reserve Life Assurance Company*, 570 F.Supp. 8, 10 (M.D. Tenn. 1983). Here, BAE has
4 alleged no facts at all. It has demonstrated nothing to support its mere allegations that its work
5 was performed at the direction of a federal officer. The allegations are not even supported by a
6 declaration of counsel. They are simply averments in the motion wholly unsupported by facts.
7
8 As such they do not meet the threshold test to support the removal.
9

10 5. PLAINTIFFS ARE ENTITLED TO AN AWARD
11 OF COSTS AND ATTORNEYS' FEES

12 Plaintiffs request fees and costs incurred in moving for remand pursuant to 28 USC §
13 1447(c). "[F]ees are proper when removal is wrong as a matter of law, even though the
14 defendant's position may be 'fairly supportable.'" *Hofler v. Aetna US Healthcare*, 296 F.3d
15 764, 770 (9th Cir. 2002) (affirming award of \$9,750 in attorneys' fees for improper removal).
16 Here, removal was improper as a matter of law, as BAE's removal papers do not even allege the
17 facts necessary to justify removal under the federal officer removal statute
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IV.

CONCLUSION

BAE has not even alleged that it used asbestos-containing products or failed to warn at the specific direction of an officer of the federal government. That allegation is necessary to establish the propriety of removal under the federal officer removal statute. Because the removal papers are inadequate on their face, the removal was improper as a matter of law, and plaintiffs are entitled to costs and fees incurred in making this motion.

Dated: June 29, 2007

BRAYTON❖PURCELL LLP

/s/ Lloyd F. LeRoy

By: _____

Lloyd F. LeRoy
Attorneys for Plaintiff